



## Santa Clara Law Review

Volume 35 | Number 1

Article 3

1-1-1994

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### Recommended Citation

Seong Hwan Kim, *California's Unfair Comepetition Act: Will it Give Rise to Yet Another Wave in Smoking and Health Litigation?*, 35 SANTA CLARA L. REV. 193 (1994).

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# CALIFORNIA'S UNFAIR COMPETITION ACT: WILL IT GIVE RISE TO YET ANOTHER 'WAVE' IN SMOKING AND HEALTH LITIGATION?

Seong Hwan Kim\*

## I. INTRODUCTION

Public concern about the carcinogenic effects of tobacco use heightened in 1954 when scientists at the Memorial Sloan-Kettering Cancer Center discovered that tobacco tar induced cancerous tumors in mice.<sup>1</sup> To address the public's concern, in 1962, Congress formed an investigative advisory committee. That committee concluded in 1964 that cigarette smoking is causally related to lung cancer, chronic bronchitis, emphysema and coronary artery disease.<sup>2</sup>

The tobacco industry's response to this adverse scientific evidence was a full-page advertisement entitled "A Frank Statement to Cigarette Smokers."<sup>3</sup> In this advertisement, the tobacco industry announced that it "accept[ed] an interest in people's health as a basic responsibility, paramount to every other consideration in [its] business."<sup>4</sup> Further, the tobacco industry announced that it would establish and fund a

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1. Alix M. Freedman & Laurie P. Cohen, *Smoke and Mirrors, How Cigarette Makers Keep Health Question "Open" Year After Year*, WALL ST. J., Feb. 11, 1993, at A1.

2. ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE, U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, *SMOKING AND HEALTH* (1964).

3. The author does not have access to some of the evidence to which this article refers. Thus, the author will quote secondary sources that reference this evidence. Freedman & Cohen, *supra* note 1, at A1.

4. Freedman & Cohen, *supra* note 1, at A1; *see also* Brief for Plaintiff's Jury Demand at 9, *Cordova v. Liggett Group Inc.*, (Cal. Super. Ct. 1992) (No. 651824) [hereinafter *Cordova Jury Demand*].

Another advertisement commissioned by the tobacco industry read as follows: "We recognize that we have a special responsibility to the public—to help scientists determine the facts about tobacco and health, and about certain diseases that have been associated with tobacco use." *Id.*

new research group, the Council for Tobacco Research (CTR),<sup>5</sup> that would be completely "autonomous" despite its funding source and would fully investigate and disclose to the public all information about tobacco use and health.<sup>6</sup>

Almost 40 years after the creation of the CTR, emerging evidence indicates that the tobacco industry's pledge to fairly research and report the health effects of tobacco use was a public relations hoax and the CTR functioned as a front for this scheme.<sup>7</sup> In sharp contrast to the tobacco industry's as-

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5. See *Hearing of the Health and Environment Subcommittee of the House Energy and Commerce Committee*, FEDERAL NEWS SERVICE, May 26, 1994; Cordova Jury Demand, *supra* note 4, at 9. The Council for Tobacco Research was originally named the Tobacco Industry Research Council.

6. See Freedman & Cohen, *supra* note 1, at A1, A6; Cordova Jury Demand, *supra* note 4, at 9.

The tobacco industry published an advertisement entitled "A Statement About Tobacco and Health" that acknowledged, in relevant part:

We accepted this responsibility in 1954 by establishing the Tobacco Industry Research Committee, which provides research grants to independent scientists. We pledge continued support of this program of research until the facts are known . . .

We shall continue all possible efforts to bring the facts to light. In that spirit we are cooperating with the Public Health Service in its plan to have a special study group review all presently available research . . .

Cordova Jury Demand, *supra* note 4, at 9, 10 (omission in original).

The trade association of tobacco producers, the Tobacco Institute, placed the following advertisement during the 1970's entitled *The Question About Smoking and Health Is Still A Question*:

[A] major portion of this scientific inquiry has been financed by the people who know the most about cigarettes and have a great desire to learn the truth . . . the tobacco industry.

And the industry has committed itself to this task in the most *objective* and scientific way possible. . . .

*Completely autonomous*, CTR's research is directed by a board of ten scientists and physicians. . . . This board has full authority and responsibility for policy, development and direction of the research effort.

Cordova Jury Demand, *supra* note 4, at 10.

Yet another advertisement commissioned by The Tobacco Institute maintained that the tobacco industry is "cooperating in efforts to learn and to *make known all the facts*. . . . The Tobacco Institute believes that the American public is entitled to complete, authenticated information about cigarette smoking and health." *Id.* (emphasis added).

7. See *Hearing of the Environmental Subcommittee*, *supra* note 5. Congressman Henry Waxman explained that, in response to the mounting scientific evidence linking smoking to health diseases, the tobacco industry retained the public relations firm of Hill & Knowlton in 1953. Hill & Knowlton recommended that the tobacco industry create the Council for Tobacco Research to research and present to the public scientific evidence negating the link between smoking and health diseases. JOHN F. VARGO & J. D. LEE, CIPOLLONE V. LIGHTGETT GROUP, INC.: U.S. SUPREME COURT OPENS THE DOOR TO TOBACCO LAWSUITS at 16 (1992). There is strong evidence that several tobacco companies realized,

surance of the CTR's independence and objectivity, recent evidence indicates that the tobacco industry manipulated the CTR to perpetuate doubts about the link between smoking and health diseases by sponsoring only those research projects that exonerated smoking as a health hazard and by discontinuing sponsorship of research projects that implicated smoking as a health hazard.<sup>8</sup> Moreover, through the use of the "Special Projects" division, the tobacco industry concealed research results that revealed a causal link between smoking and health diseases.<sup>9</sup> The mechanics of the concealment were simple; because the claimed purpose of the research sponsored by the Special Projects division was to develop a field of expert witnesses to defend the tobacco indus-

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by the early 1960's, that smoking caused lung cancer but, contrary to their pledge to the public, concealed this knowledge. Cordova Jury Demand, *supra* note 4, at 16.

An internal memorandum regarding a CTR meeting of October 25, 1978, in Lexington, Kentucky, reads as follows:

After some further discussion, Janet and Arnie Henson expressed American Tobacco Company's view that CTR must be maintained but needed new people. It must be more politically oriented. They felt that CTR must look at what is happening and what others are doing to see what questions can be raised, etc. The approach must be steady, slow and conservative. They must find skeptical scientists. . . . The staff at CTR also needed to be more tobacco oriented with a skeptical view.

Cordova Jury Demand, *supra* note 4, at 15.

Another internal memorandum regarding a CTR meeting held in New York in November, 1978, states as follows:

CTR began as an organization called Tobacco Industry Research Council (TIRC). *It was set up as an industry 'shield' in 1954. That was the year statistical accusations relating smoking to diseases were leveled at the industry; litigation began; and the Wynder/Graham reports were issued. CTR has helped our legal counsel by giving advice and technical information, which was needed at court trials. CTR has provided spokesmen for the industry at Congressional hearings. The monies spent on CTR provides a base for introduction of witnesses. . . .*

Bill Shinn feels that "special projects" are the best way that monies are spent. *On these projects, CTR has acted as a 'front' . . . .*

[B]ill Shinn mentioned that the 'public relations' value of CTR must be considered and continued. . . . A very interesting point, made by Bill Shinn . . . [is that] *[i]t is extremely important that the industry continue to spend their dollars on research to show that we don't agree that the case against smoking is closed. . . . There is a 'CTR basket' which must be maintained for 'PR' purposes. . . . It is interesting that this proposal by Shinn is somewhat in line with the thinking we had planned to present to the Committee later on in the day.*

Cordova Jury Demand, *supra* note 4, at 15-16.

8. Freedman & Cohen, *supra* note 1, at A1, A6.

9. *Id.* See *infra* notes 10-11 and accompanying text.

try in tort suits, information gained through Special Projects division research was protected under the attorney work-product privilege.<sup>10</sup> Thus, by channeling research projects with adverse results into the Special Projects division, the CTR was able to conceal their results from public disclosure.<sup>11</sup>

If allegations of industry-wide conspiracy to defraud the public about the health hazards of smoking are substantiated, the tobacco industry could face huge civil liabilities. However, suing the tobacco industry has been difficult at best.<sup>12</sup> Over the years, plaintiffs have unsuccessfully sued

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10. See generally CAL. CODE CIV. PROC. § 2018 (West 1987); BP Alaska Exploration, Inc. v. Superior Ct., 245 Cal. Rptr. 682, 685 (Ct. App. 1988) (holding that the "crime fraud exception provided in [California] Evidence Code section 956 does not apply to writings protected by the absolute [attorney] work product rule . . .").

11. See *supra* note 7; see also Cordova Jury Demand, *supra* note 4, at 14-15.

A transcript of a conversation at a meeting held by the tobacco industry's committee of general counsel indicates that the CTR was engaged in such concealment practices:

STEVENS: I need to know what the historical reasons were for the difference between the criteria for lawyers' special projects and CTR special projects . . . .

JACOB: When we started the CTR Special Projects, the idea was that the scientific director of CTR would review a project. If he liked it, it was a CTR special project. If he did not like it, then it became a lawyers' special project . . . .

STEVENS: . . . .

JACOB: [W]e were afraid of discovery for FTC and Aviado, we wanted to protect it under the lawyers. We did not want it out in the open.

*Id.* at 14.

Another document entitled "Notes from the September 10, 1981 Meeting of Company Counsel and Ad Hoc Committee Members" reads as follows:

E.J.: Difference between CTR and Special Four (lawyers' projects). Director of CTR reviews special projects—project was problem for CTR, use Special Four. Also, if there are work-product claims, need the lawyers' protection, *e.g.*, CTR's past director, Bill Gardiner, didn't think much of Rowe's work; Special Four financed him and he is now published, *e.g.*, motivational research that was done during the FTC investigation was done through Special Four because of possibility that CTR would be subpoenaed. *e.g.*, Joe Janus' current study of cohort effect (those born in 1890-1910) is a full CTR project—Special Four gave interim support.

*Id.* at 15.

12. See Beverly L. Jacklin, *Federal Pre-Emption of State Common-Law Products Liability Claims Pertaining to Tobacco Products*, 97 A.L.R. FED 890 (1992). Claims leveled at the tobacco industry range from strict products liability, to fraudulent misrepresentation, to breach of express and implied warranty. *Id.*

the tobacco industry under various theories.<sup>13</sup> Despite the fact that an estimated 434,000 people die each year due to smoking related diseases,<sup>14</sup> the tobacco industry has yet to pay out a single dime in judgment or settlement.<sup>15</sup> The difficulty these plaintiffs have had is attributable to the inadequacies of certain tort theories in providing redress in tobacco related cases<sup>16</sup> and the barriers imposed against these claims by state<sup>17</sup> and federal statutes.<sup>18</sup>

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13. *Id.*

14. CENTERS FOR DISEASE CONTROL, SMOKING—ATTRIBUTABLE MORTALITY AND YEARS OF POTENTIAL LIFE LOST—UNITED STATES (1991).

15. See Paul G. Crist & John M. Majoras, *The "New" Wave in Smoking and Health Litigation—Is Anything Really So New?*, 54 TENN. L. REV. 551, 552 (1987) (commenting that none of the tobacco related law suits brought in the 1950's and 1960's were resolved adversely to the manufacturer); Nightline with Ted Koppel (ABC television broadcast, Mar. 1993). In this broadcast former director of the CTR indicated that the tobacco industry has yet to pay any monetary amount in judgments or settlements for tobacco-related lawsuits. *Id.*

16. For example, it is difficult to succeed against the tobacco industry under tort theories that require a plaintiff to show that she was reasonable in relying upon the tobacco manufacturers' misrepresentations about the health effects of tobacco use. This is due to the fact that members of the general public are generally well aware of the deleterious health effects of tobacco use. See Crist & Majoras, *supra* note 15; see also *infra* notes 45-48 and accompanying text.

17. See CAL. CIV. CODE § 1714.45 (West Supp. 1995) (precluding "product liability" action for death or injury caused by tobacco products); see also *American Tobacco Co. v. Superior Ct.*, 255 Cal. Rptr. 280 (Ct. App. 1989) (interpreting California Civil Code section 1714.45 as immunizing the American Tobacco Co. from liability for injuries attributable to the use of its tobacco products).

More specifically, the text of California Civil Code section 1714.45 reads as follows:

(a) In a product liability action, a manufacturer or seller shall not be liable if:

(1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and

(2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, tobacco, and butter, as identified in comment i to section 402A of the Restatement (Second) of Torts.

(b) For purposes of this section, the term "product liability action" means any action for injury or death caused by a product, except that the term does not include an action based on a manufacturing defect or breach of an express warranty.

(c) This section is intended to be declarative of and does not alter or amend existing California law, including *Cronin v. J.B.E. Olson Corp.*, (1972) 8 Cal. 3d 121 [501 P.2d 1153 (Cal. 1972)], and shall apply to all product liability actions pending on, or commenced after, January 1, 1988.

CAL. CIV. CODE § 1714.45 (West Supp. 1995).

In light of the disappointing results obtained under these "traditional" claims, this article will focus on a non-traditional claim that can be brought against the tobacco industry, an action based on section 17200 and other related sections of the California Business and Professions Code.<sup>19</sup> In assessing the legal feasibility of bringing such a claim against the tobacco industry,<sup>20</sup> this article will analyze the current Supreme Court decision in *Cipollone v. Liggett Group, Inc.*<sup>21</sup> to determine whether federal law preempts such claims.<sup>22</sup> Lastly, this article will analyze the tactical advantages and drawbacks of this claim in its application against the tobacco industry.<sup>23</sup>

## II. STATUTORY BACKGROUND

Sections 17200 through 17205<sup>24</sup> collectively embody the re-codification of the former California Civil Code section 3369.<sup>25</sup> These sections are commonly referred to as the "Unfair Competition Act." Until 1962, they were more or less ap-

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18. See *infra* notes 56-84 and accompanying text (discussing the preemptive scope of 15 U.S.C. §§ 1331-1334) (1988).

19. California Civil Code section 1714.45 does not seem to preclude claims brought under California Business and Professions Code sections 17200-17500 because these claims are not "product liability action[s]" as defined by California Civil Code section 1714.45(b). CAL. CIV. CODE § 1714.45 (West Supp. 1995). More specifically, claims brought under California Business and Professions Code sections 17200-17500 are not "action[s] for injury or death" caused by tobacco products, but are claims seeking redress for acts of unfair competition by the tobacco product manufacturers. CAL. BUS. & PROF. CODE § 17200-17500 (West Supp. 1994). In fact, a plaintiff suing under California Business and Professions Code sections 17200-17500 need not allege actual injuries from defendant's conduct. *Id.*; see *infra* notes 95-96 and accompanying text.

20. The scope of this article is limited to analyzing claims that can be brought by *private* plaintiffs under California Business and Professions Code sections 17200-17500. This article will not discuss claims that can also be brought by public law enforcement agencies under these sections. Further, this article will not discuss other tort claims that have traditionally been brought against the tobacco industry, except where the discussion is necessary to develop fully the claims that can be brought by private plaintiffs under sections 17200-17500.

21. 112 S. Ct. 2608 (1992).

22. See *infra* text accompanying notes 56-114.

23. See *infra* text accompanying notes 115-34.

24. All future statutory references are to the California Business and Professions Code, unless otherwise specified.

25. Wesley J. Howard, *Former Civil Code Section 3369: A Study in Judicial Interpretation*, 30 HAST. L. J. 705, 726 (1979).

Applicable parts of the former California Civil Code section 3369 read as follows:

plied strictly to name infringement cases.<sup>26</sup> However, since the case of *People ex rel. Mosk v. National Research Co.*,<sup>27</sup> the scope of the Unfair Competition Act has been extended to "any 'unlawful, unfair or (deceptive) business practice' . . . in whatever context such activity might occur."<sup>28</sup>

To bring an unfair competition claim, a plaintiff needs to show that the defendant engaged in "unfair competition."<sup>29</sup> Section 17200 defines "unfair competition" to include:

[A]ny unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with section 17500) of Part 3 of Division 7 of the Business and Professions Code.<sup>30</sup>

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2. Any person performing or proposing to perform an act of unfair competition within this state may be enjoined in any court of competent jurisdiction.

3. As used in this section, unfair competition shall mean and include (unlawful) unfair or fraudulent business practice and unfair, untrue, (deceptive) or misleading advertising and any act denounced by Penal Code Sections 654a, b, or c.

5. Actions for injunctions under this section may be prosecuted by . . . any person acting for the interests of itself, its members, or the general public.

*Id.* at 705-06 (citing Cal. Stat. 1933, ch. 953, § 1, at 2482, as amended by Cal. Stat. 1963, ch. 1606, § 1, at 3184 (parenthetical words added in 1963)).

26. *Id.* at 712-19; see also *Bank of the West v. Superior Ct.*, 833 P.2d 545, 550 (Cal. 1992). The court explained that "[t]he common law tort of unfair competition is generally thought to be synonymous with the act of passing off one's goods as those of another." *Id.* at 551.

27. 20 Cal. Rptr. 516 (Ct. App. 1962).

28. *Barquis v. Merchants Collection Assn.*, 496 P.2d 817 (Cal. 1972) (emphasis added). The *Barquis* court employed the Unfair Competition Act to enjoin a collection agency from knowingly and willfully filing collection actions in improper counties for the purpose of hindering the debtors' defense. *Id.* at 819, 828-31.

Since *Barquis*, California courts have adopted an expansive definition of "unfair competition" and have applied the Unfair Competition Act to various types of conduct outside of the name infringement context. A review of these cases illustrates the broad range of conduct subject to the Unfair Competition Act, including giving redress for unauthorized duplication of music records and for improper towing and impounding of parked cars. See, e.g., *Capitol Records, Inc. v. Erickson*, 82 Cal. Rptr. 798 (Ct. App. 1969) (enjoining defendant from making "pirate" copies of records sold by the plaintiffs and selling the inferior copies to the public at reduced prices); *People v. James*, 177 Cal. Rptr. 110 (Ct. App. 1981) (enjoining liquor store owner and tow service operator from towing and impounding cars from the liquor store's parking lot without proper warning signs).

29. *Hernandez v. Atlantic Finance Co.*, 164 Cal. Rptr. 279, 284 (Ct. App. 1980).

30. CAL. BUS. & PROF. CODE § 17200 (West Supp. 1995).



Thus, a plaintiff suing under this statute must demonstrate that the defendant engaged in: (1) a business act or practice that is unlawful, unfair or fraudulent;<sup>31</sup> (2) advertising that is unfair, deceptive, untrue or misleading;<sup>32</sup> or (3) an act that is prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.<sup>33</sup>

### A. *The First Prong of Section 17200*

Under the first prong of section 17200 of the Business and Professions Code, any "business practice" that is "unlawful" falls within the definition of "unfair competition."<sup>34</sup> Thus, any business practice that violates other statutory laws is actionable under section 17200.<sup>35</sup> To bring an unfair competition claim based on the first prong of section 17200, a plaintiff must allege and establish all requisite elements which constitute a violation of the underlying statute.<sup>36</sup>

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31. Hereinafter referred to as the "first prong" of the Unfair Competition Act.

32. Hereinafter referred to as the "second prong" of the Unfair Competition Act.

33. Hereinafter referred to as the "third prong" of the Unfair Competition Act.

Section 17500 is the only relevant section in Chapter 1, Part 3, Division 7 of the California Business and Professions Code.

34. CAL. BUS. & PROF. CODE § 17200 (West Supp. 1995).

35. Examples of unlawful business practices that are actionable under the first prong of section 17200 include: assisting in the operation of a brothel in violation of the RED LIGHT ABATEMENT LAW, CAL. PENAL CODE §§ 11225-11235 (West 1992), *People v. Loudon*, 196 Cal. Rptr. 582 (Ct. App. 1983); possessing and distributing obscene matters in violation of CAL. PENAL CODE § 311.2 (West 1988), *People v. E.W.A.P., Inc.*, 165 Cal. Rptr. 73, 74-75 (Ct. App. 1980); and improperly operating a mobile home park in violation of the MOBILEHOME PARKS ACT, CAL. HEALTH & SAFETY CODE §§ 18200-18700 (West 1992), *People v. McKale*, 602 P.2d 731, 733 (Cal. 1979). Further, business practices that violate section 17500 would also seem to violate the first prong of section 17200, as well as the third prong of section 17200.

36. The point is illustrated in *E.W.A.P.* where the State of California brought an unfair competition claim against the defendants for possessing obscene material for the purposes of distribution. *E.W.A.P.*, 165 Cal. Rptr. at 74. The State's claim rested on the assertion that the defendants' possession of the obscene matter for distribution violated California Penal Code section 311.2 which proscribed a person from "knowingly . . . possess[ing] . . . with intent to distribute . . . any obscene matter . . . ." *Id.* (citing CAL. PENAL CODE § 311.2 (West 1988)) (emphasis added). The court in *E.W.A.P.* made clear that, [since] the People's theory in this case is that defendant's business practices are unlawful because they violate Penal Code section 311.2, [in order for the People] to establish that defendants' conduct comes within section 17200 the People would have to prove [every element of

Thus, because analysis of the first prong of section 17200 is specific to the particular underlying statute, this discussion will be limited to this threshold analysis.

### B. *The Second and Third Prongs of Section 17200*

Courts have interpreted section 17500 and the second prong of section 17200 of the California Business and Professions Code to be synonymous despite differences in the statutory language.<sup>37</sup> Both of these provisions are violated if

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the underlying statutory violation and show] that defendants 'knowingly' distributed or possessed for distribution obscene matter.  
*Id.* at 77 (emphasis added) (citing CAL. PENAL CODE § 311.2 (West 1988)).

There is one exception to this rule in that the plaintiff need not show that she would have had standing to sue directly through the underlying statute. Instead, the plaintiff derives her standing to bring an unfair competition claim under section 17204. *See* CAL. BUS. & PROF. CODE § 17204 (West Supp. 1995) ("[a]ctions for any relief pursuant to this chapter shall be prosecuted . . . by any person acting for the interests of itself, its members or the general public."). *Midpeninsula Citizens for Fair Housing v. Westwood Investors*, 271 Cal. Rptr. 99 (Ct. App. 1990), is illustrative. In this case, a consumer protection organization brought a section 17200 claim alleging that the defendants violated the provisions of the Unruh Act. *Id.* at 100. The plaintiff was not an injured party and thus did not have standing to sue directly under the Unruh Act. *Id.* Nevertheless, the court held that the plaintiff derived its standing to bring the unfair competition claim under section 17204, independent of the Unruh Act. *Id.* at 107.

37. The differences in the language of these two sections are considerable. For example, the second prong of section 17200 proscribes "unfair, deceptive, untrue, or misleading advertising." CAL. BUS. & PROF. CODE § 17200 (West Supp. 1995). Section 17500 proscribes any person from disseminating any untrue or misleading statement, by any means, about personal property, real property or service, with the intent to sell such personal property, real property or service. CAL. BUS. & PROF. CODE § 17500 (West 1987). Further, section 17500 is violated only if the defendant should have known her statement was untrue or misleading with the exercise of reasonable care. *Id.* In sum, the two statutes differ in that: (1) section 17200 proscribes unfair or deceptive advertisements as well as untrue or misleading advertisements, whereas section 17500 applies literally only to untrue or misleading statements; (2) section 17200 applies only to advertisements, whereas section 17500 applies to any statement; (3) section 17500 is violated only if the defendant made the statement with the intent to dispose of property, perform service or to induce the public to enter into an obligation; and (4) section 17500 is violated only if the defendant should have known that the statement is untrue or misleading with the exercise of reasonable care. CAL. BUS. & PROF. CODE § 17500 (West 1987).

Upon closer examination, however, to a certain extent the differences seem linguistic rather than substantive. For example, the requirement in section 17500 that the "statement" be made "with [the] intent [to] directly or indirectly . . . dispose of real or personal property or to perform services . . . or to induce the public to enter into any obligation relating thereto" may be synonymous with the requirement in section 17200 that the misrepresentation complained of constitute an "advertisement." CAL. BUS. & PROF. CODE § 17200 (West Supp.

"members of the public are likely to be deceived" by the defendant's advertisements.<sup>38</sup> Surprisingly, no reported case has yet defined the terms "unfair," "deceptive," "untrue," or "misleading" specifically within the context of unfair competition claims. Instead, courts have defined the term "unfair competition" generically. For example, the court in *People ex rel. Mosk. v. National Research Co.*<sup>39</sup> noted:

"Unfair competition" and "unfair or fraudulent business practice," are generic terms. Like the terms "nuisance" or "negligence" they must be translated into specific situations of fact in order to be cognizable. . . . "[U]nfair or fraudulent business practice" under any given set of circumstances is a question of fact, the essential test being whether the public is likely to be deceived.<sup>40</sup>

The generic manner in which the courts have defined unfair competition leaves open the question whether the Unfair Competition Act encompasses the aforementioned conduct engaged in by the tobacco industry. Because the touchstone of the second and third prongs of the Unfair Competition Act is whether "members of the public are likely to be deceived," it is unclear whether an "unfair," "deceptive," or "untrue" advertisement that is unlikely to deceive the public constitutes a violation of the Unfair Competition Act.<sup>41</sup>

### C. Reasonable Reliance

It is indeed conceivable to imagine a false statement that is unlikely to deceive the public. For example, members of

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1995). In fact, the definition of the term "advertisement" is a "call[ing of] public attention to things for sale." WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 2 (1994).

Notwithstanding the foregoing and case law that treats sections 17200 and 17500 as synonymous, it is difficult to reconcile the statutory language with this conclusion. Specifically, it is difficult to reconcile, (a) the fact that section 17200 proscribes "unfair [or] deceptive" advertisements as well as "untrue or misleading" advertisements, while section 17500 applies literally only to "untrue or misleading" statements; and (b) that section 17500 is violated only if the defendant should have known that the statement is untrue or misleading with the exercise of reasonable care. CAL. BUS. & PROF. CODE §§ 17200, 17500 (West 1987 & Supp. 1995).

38. *Chern v. Bank of America*, 544 P.2d 1310, 1316 (Cal. 1976).

39. 20 Cal. Rptr. 516 (Ct. App. 1962).

40. *Id.* at 521 (quoting *Grant v. California Bench Co.*, 173 P.2d 817 (Cal. Ct. App. 1946)).

41. See CAL. BUS. & PROF. CODE § 17200 (West Supp. 1995); CAL. BUS. & PROF. CODE § 17500 (West 1987).

the public are unlikely to be deceived by false statements that are patently unreliable. Thus, defining unfair competition as an advertisement that is *likely to deceive the public* seems to incorporate a standard of reasonable reliance. Taken literally, this standard appears to deny redress to plaintiffs who actually rely on obviously unreliable misrepresentations.<sup>42</sup>

Imposition of a reasonable reliance standard may be fatal to an unfair competition claim brought against the tobacco industry. Arguably, the misrepresentations made by the tobacco industry through the CTR are so patently unreliable they are unlikely to mislead a reasonable person and, therefore, do not constitute "unfair competition." More specifically, the tobacco industry's promotion of the CTR as an independent organization may be inherently unreliable because of the CTR's financial ties with the tobacco industry.<sup>43</sup> In addition, any assertions made by the CTR disclaiming a link between smoking and health may be unreliable not only because of its financial affiliation with the tobacco industry but, more im-

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42. Notwithstanding the assumption that the judicial definition of unfair competition incorporates a standard of reasonable reliance, courts have nevertheless failed to clearly define this standard. Given that a plaintiff suing under the Unfair Competition Act need not allege personal reliance on the misrepresentation or that she was injured thereby, the reasonableness standard must necessarily be an objective one. *Committee on Children's Television, Inc. v. General Foods Corp.*, 673 P.2d 660, 668 (Cal. 1983) (noting that unlike a claim based on the "tort of fraud," "allegations of *actual deception* . . . are unnecessary" to state a cause of action under section 17200 (emphasis added)). Further, in the case of tobacco litigation, the objective reasonable person appears to be a smoker, given that the California Supreme Court has defined the applicable standard to be whether a member of the "general public *with whom defendant deals*" is likely to be deceived. *Chern*, 544 P.2d at 1316 (emphasis added). On the other hand, it can be argued that the tobacco industry "deals with" non-smokers who are considering whether or not to smoke. Either way, this clarification does not seem helpful given that smokers are comprised of a general cross section of society. A more helpful standard can be gleaned from the decision in *Chern*. In *Chern*, the California Supreme Court found that the defendant bank's practice of quoting "per annum" interest rate to its customers was misleading despite the fact that such practice was "customary . . . within the banking community" and borrowers could have easily discovered the discrepancy between quoted rate and the actual rate charged. *Id.* A "per annum" rate of interest is calculated based on a 360 day year but actual rate of interest charged is calculated based on the actual number of days in a particular year which is either 365 or 366 days. *Id.* at 1312. The former rate is slightly lower than the latter rate. Thus, by analogy, it appears that the objective "reasonable" person need not be a person who is particularly well informed nor inquisitive about the health hazards of smoking.

43. See *supra* text accompanying notes 5-6.

portantly, because of the general public's awareness of the deleterious health effects of smoking.<sup>44</sup>

To be sure, the majority of the population, including millions of smokers, either knows that smoking is hazardous to health or is aware of evidence indicating this fact.<sup>45</sup> There are literally thousands of publications, songs, poems, cartoons, movies, and other forms of mass media that warn the general public of the hazards of smoking.<sup>46</sup> Furthermore, virtually every state school system has adopted some form of curriculum addressing smoking and health issues.<sup>47</sup> Lastly, the California Legislature has codified the general public's awareness that tobacco is an inherently unsafe product.<sup>48</sup> Consequently, the viability of successfully asserting an unfair competition claim against the tobacco industry appears to hinge upon whether California courts adopt a restrictive definition of unfair competition and impose the reasonable reliance standard upon the plaintiff.

The history behind the Act and recent decisions indicate that the scope of the Unfair Competition Act will not be limited in this manner.<sup>49</sup> In the past, California courts have been reluctant to narrowly interpret the term "unfair competition." For example, the court in *Athens Lodge v. Wilson*<sup>50</sup> stated that the language of the civil code, "unfair competition" and "shall mean and include," is not restrictive or exclusive.<sup>51</sup>

Furthermore, California courts have long recognized section 17200 as an equitable statute. For example, in extending the Unfair Competition Act beyond name infringement cases, the court in *Academy of Motion Picture Arts and Sciences v. Benson*<sup>52</sup> remarked:

When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court

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44. See *infra* text accompanying notes 45-48.

45. Crist & Majoras, *supra* note 15, at 558.

46. *Id.* at 553-60.

47. *Id.* at 557-58.

48. See *supra* note 17. The court in *American Tobacco Co.* interpreted California Civil Code section 1714.45 as codifying the fact that "ordinary consumers" are aware that tobacco products are "inherently unsafe." *American Tobacco Co. v. Superior Ct.*, 255 Cal. Rptr. 280, 282-83 (Ct. App. 1989).

49. See *infra* notes 54, 139-145 and accompanying text.

50. 255 P.2d 482 (Cal. Ct. App. 1953).

51. *Id.* at 484.

52. 104 P.2d 650 (Cal. 1940).

of equity is not impotent to frustrate its consummation because the scheme is an original one. There is a maxim as old as law that there can be no right without a remedy, and in searching for a precise precedent, an equity court must not lose sight, not only of its power, but of its duty to arrive at a just solution of the problem.<sup>53</sup>

Lastly, at least one recent decision has expressly indicated that reasonable reliance is not a requisite element of an unfair competition claim.<sup>54</sup>

It appears that the tobacco industry engaged in nothing less than an intentional scheme to deceive the public about the truth concerning smoking and health. In response to this intentional scheme, it is probable that courts will depart from the traditional definition of unfair competition and interpret the statutes as proscribing such conduct.<sup>55</sup>

### III. PREEMPTION

The traditional definition of unfair competition<sup>56</sup> poses difficulty not only in establishing a *prima facie* case under the Unfair Competition Act but also in escaping federal preemption under 15 U.S.C. sections 1331 through 1340, known as the "Labeling Act."<sup>57</sup> In 1965, Congress enacted the Labeling Act in response to diverse laws that were proposed or enacted to regulate cigarette labeling and advertisement.<sup>58</sup> Congress

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53. *Id.* at 653; see also *Barquis v. Merchants Collection Assn.*, 496 P.2d 817, 830 (Cal. 1972). The court noted that section 17200 "establishes only a wide standard to guide courts of equity [and] . . . given the creative nature of the scheming mind, the Legislature evidently concluded that a less inclusive standard would not be adequate." *Id.*

54. See *Committee on Children's Television, Inc. v. General Foods Corp.*, 673 P.2d 660 (Cal. 1983). The plaintiff in *Children's* brought suit based on the Unfair Competition Act and on a common law fraudulent misrepresentation theory. The court held that, unlike a claim based on the tort of fraud, "allegations of actual deception, *reasonable reliance*, and damage are unnecessary" to state a cause of action under the Unfair Competition Act. *Id.* at 668 (emphasis added).

55. To be sure, such a judicial interpretation would not require an expansion of the statute; courts can impose liability on the tobacco industry simply by giving full effect to the language contained in the statute. More specifically, the tobacco industry's conduct seems to fall squarely within the statutory definition of unfair competition as a "deceptive [or] untrue . . . advertisement." See *supra* text accompanying note 30 for the text of section 17200.

56. See *supra* text accompanying notes 39-40.

57. 15 U.S.C. §§ 1331-1340 (1988).

58. See 111 CONG. REC. 13900-02 (1964) (statement of Sen. Moss); see also *Cigarette Labeling and Advertising: Hearings Before the Committee on Inter-*

feared that diverse local and state regulations would create chaotic conditions for the tobacco industry.<sup>59</sup> Thus, Congress expressly provided for preemption in this area.<sup>60</sup> In so doing, Congress made clear its desire to strike a balance between the two conflicting interests: informing the public of the hazards of tobacco products and protecting parts of the national economy dependent on the tobacco industry.<sup>61</sup>

Because of its importance, the scope of the preemption provision was actively disputed in tobacco litigation.<sup>62</sup> The resulting decisions left the area fraught with ambiguity and conflict.<sup>63</sup> To resolve the conflicts among the circuits and to clarify this issue, the United States Supreme Court recently granted *certiorari* in *Cipollone v. Liggett Group, Inc.*<sup>64</sup> Unfortunately, the Court's decision fell short of the desired clarification.

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*state and Foreign Commerce*, House of Representatives, 88th Cong., 2nd. Sess. 4-5, 7-9, 11-12 (1964).

59. *Id.*

60. See 15 U.S.C. § 1334 which reads, in relevant part:

(1) no statement relating to smoking and health, other than the statement required by section 4 of this Act [15 U.S.C. § 1333], shall be required on any cigarette package. . . .

15 U.S.C. § 1334 (1988). See also 15 U.S.C. § 1331 (1988) which states:

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331 (1988).

61. See 15 U.S.C. § 1331 (1988). Section 1331 reads in relevant part, as follows:

It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331 (1988).

62. For a general discussion, see Jacklin, *supra* note 12.

63. See *id.*

64. 112 S. Ct. 2608 (1992).

In *Cipollone*, the petitioner sued the respondents alleging that she developed lung cancer because she smoked cigarettes manufactured and sold by the defendants.<sup>65</sup> The petitioner alleged, *inter alia*, that the respondents were guilty of fraudulent misrepresentation because they attempted to neutralize the effect of federally mandated warning labels through their promotional activities, and deprived the public of medical and scientific data linking smoking to health diseases.<sup>66</sup> The respondents challenged the petitioner's fraudulent misrepresentation claims arguing that they were preempted by the Labeling Act.<sup>67</sup>

In a decision split three ways, the plurality's preemption analysis included a caveat that when a Congressional enactment expressly provides for preemption, the preemption analysis is limited by the express language contained in that provision.<sup>68</sup> In other words, Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted.<sup>69</sup> The Court found Section 1334 of the Labeling Act, entitled "Preemption," to be such a provision.<sup>70</sup> The section reads, in relevant part, that "no statement relating to smoking and health, other than the statement required by section 4 of this Act (15 U.S.C. section 1333), shall be required on any cigarette package."<sup>71</sup> Focusing on the phrase "relating to smoking and health," the plurality held that this provision preempts only those claims that are predicated upon a "duty based on smoking and health."<sup>72</sup>

The plurality held that the petitioner's fraudulent misrepresentation claims, alleging that the respondents' advertising neutralized the effect of federally mandated warning labels, were preempted because such claims were predicated upon a "duty based on smoking and health."<sup>73</sup> However, the

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65. *Id.* at 2614. The original lawsuit was brought by Rose Cipollone in 1983. Upon her death, her son maintained the lawsuit as the executor of her estate. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 2617.

69. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992).

70. *Id.* at 2618.

71. 15 U.S.C. § 1334 (1988).

72. *Cipollone*, 112 S. Ct. at 2623.

73. *Id.* at 2623. The plurality did not specifically state that such fraudulent misrepresentation claims are predicated upon a "duty based on smoking and



petitioner's fraudulent misrepresentation claim, alleging that respondents made false representations and concealed material facts about the deleterious health effects of smoking, was saved from preemption because such a claim was based on a "duty not to deceive" rather than a duty "based on smoking and health."<sup>74</sup>

The plurality justified this interpretation by pointing out that Congress did not indicate its desire to "insulate cigarette manufacturers from [the] long-standing rules governing fraud."<sup>75</sup> Moreover, the Court reasoned that Congress' intent to preserve state regulation of "deceptive advertising" can be inferred from its decision to preserve the Federal Trade Commission's authority to identify and punish deceptive tobacco advertising.<sup>76</sup> Lastly, the plurality justified its interpretation as "wholly consistent" with the legislative intent behind the Labeling Act.<sup>77</sup> The plurality reasoned that state law prohibition of intentional fraud does not create "'diverse, nonuniform, and confusing' standards" because such claims rely on a "single, uniform standard" of falsity.<sup>78</sup>

The plurality's opinion is confusing, inconsistent, and possibly illogical.<sup>79</sup> Other than the specified fraudulent misrepresentation claim, it is difficult to determine from the plurality's holding exactly what claims are predicated upon a "duty based on smoking and health" and, thus, preempted. Justice Scalia interprets the plurality's opinion to mean that a claim is predicated upon a "duty based on smoking and

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health." However, this can be inferred from the plurality's holding that claims are not preempted unless predicated upon a "duty based on smoking and health."

74. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2623-24 (1992).

75. *Id.* at 2624.

76. *Id.* (citing 15 U.S.C. § 1336 (1988)). 15 U.S.C. section 1336 reads as follows: "Nothing in [the Labeling Act] . . . shall be construed to limit, restrict, expand or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes."

77. *Id.* at 2624.

78. *Id.*

79. Two justices wrote dissenting opinions. Justice Blackmun was joined by Justice Kennedy and Justice Souter in describing the plurality's opinion as "creat[ing] a crazy quilt of preemption" and projecting that lower courts will encounter difficulty in attempting to implement the plurality's decision. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2631 (1992) (Kennedy, J., dissenting). Justice Scalia's dissenting opinion, joined by Justice Thomas, blasted the plurality's opinion with the statement that "a disposition that raises more questions than it answers does not serve the country well." *Id.* at 2638 (Scalia, J., dissenting).

health" if it arises under a law that is "specifically directed to 'smoking and health'" or is "uniquely crafted to address the relationship between cigarette companies and their putative victims . . . ." <sup>80</sup> However, as Justice Scalia acknowledges, this interpretation is inconsistent with the plurality's holding. <sup>81</sup> The inconsistency stems from the fact that the petitioner's failure to warn claim is predicated upon a "duty based on smoking and health" despite the fact that such a duty to warn is imposed upon all commercial suppliers. <sup>82</sup> Therefore, such a claim is not "uniquely crafted" for smoking and health litigation, nor is it "specifically directed" against the tobacco industry. Thus, to the extent that the plurality found the petitioner's failure to warn claim to be predicated upon a "duty based on smoking and health," <sup>83</sup> the dissent's interpretation is invalid.

Another possible interpretation is that a claim is predicated upon a "duty based on smoking and health" if it challenges the adequacy or sufficiency of the federally mandated warning labels regarding the health risks of smoking, or challenges the adequacy of the labels in light of the defendant's misrepresentations. This interpretation is consistent with the plurality's holding that the petitioner's failure to warn claim is preempted because such claim is predicated on the assertion that the federally mandated warning labels are insufficient and that additional or more clearly stated warnings are necessary to "make [cigarettes] . . . reasonably safe, suitable and fit for its intended use . . . ." <sup>84</sup> Furthermore, this interpretation is consistent with the plurality's holding that the petitioner's fraudulent misrepresentation claim is preempted to the extent the petitioner asserts that the respondents' promotional activities negated the efficacy or sufficiency of the federally mandated warnings.

Lastly, this interpretation may explain why the petitioner's claim that respondents made false representations or

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80. *Id.* at 2636.

81. *Id.* (referring to plurality's holding that petitioner's failure to warn claim is preempted despite the fact that the common law duty to warn about a product's danger was not "specifically crafted with an eye toward 'smoking and health'").

82. *Id.*

83. *Id.* at 2621-22.

84. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2621 (1992) (plurality's characterization of the petitioner's failure to warn claim).

concealed a material fact about the health hazards of tobacco use is saved from preemption.<sup>85</sup> This last claim does not challenge the efficacy or sufficiency of the federally mandated warning labels. Instead, this claim addresses only whether the respondent's statement or omission constituted a misrepresentation, regardless of its effect on the efficacy of the federally mandated warning labels. This distinction becomes more clear if we imagine a claim converse to those typically found in tobacco litigation. For example, if a plaintiff were to bring a fraudulent misrepresentation claim against an anti-smoking organization for misrepresenting that smoking will cause imminent death, such a claim does not seem to be "based on smoking and health" since it does not challenge the efficacy or sufficiency of the federally mandated warning.<sup>86</sup> Instead, such a claim focuses only on the falsity or deceptive nature of the defendant's statement or omission, albeit concerning the subject matter of smoking and health.

Under this interpretation, an unfair competition claim brought against the tobacco industry appears to be preempted by the Labeling Act given that the litmus test for this claim seems to be whether the "public is likely to be deceived."<sup>87</sup> More specifically, under this interpretation, an unfair competition claim against the tobacco industry is viable only if the members of the "public are likely to be deceived" by the tobacco industry's misrepresentations despite the federally mandated warning labels. In this respect, an unfair competition claim is similar to the fraudulent misrepresentation claim in *Cipollone* that the tobacco industry's promotional activities negated the efficacy or sufficiency of the federally mandated warnings and, thus, is likewise preempted.<sup>88</sup>

However, it remains unclear whether the likelihood of public deception is an indispensable element of an unfair competition claim. A strong argument can be made that an unfair competition claim can be stated to provide redress for unfair, deceptive, or untrue advertising practices without regard to their ultimate misleading effect on the public,<sup>89</sup> and

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85. *Id.* at 2613.

86. *See id.* at 2621.

87. *See supra* notes 38-41 and accompanying text.

88. *See supra* note 73 and accompanying text.

89. *See supra* notes 50-55 and accompanying text.

that it is, therefore not preempted as being based on smoking and health.<sup>90</sup> However, given the uncertainty in what constitutes a "duty based on smoking and health,"<sup>91</sup> it may be more useful to attack the preemption problem by analogy. More specifically, a plaintiff may argue that an unfair competition claim is analogous to *Cipollone's* common law fraud claim alleging that the tobacco industry made false representations or concealed a material fact and, therefore, is likewise saved from preemption.

The analogy between the two claims is far from perfect. First, the elements required to establish an unfair competition claim are markedly different from the elements required to establish a common law fraudulent misrepresentation claim. To establish a common law fraud claim, the plaintiff must show the following: (1) the defendant made a representation to a past or existing material fact; (2) the representation must have been false; (3) the defendant knew the representation was false; (4) the defendant intended for the plaintiff to rely on the representation; (5) the plaintiff must have been unaware of the falsity; (6) the plaintiff must have had reasonable reliance on the truth of the representation; and (7) the plaintiff suffered damages as a result of such reliance.<sup>92</sup>

In contrast, far fewer elements are required to establish an unfair competition claim based on the second and third prongs of section 17200. An unfair competition claim can be established if the plaintiff shows that members of the public are "likely to be deceived."<sup>93</sup> A plaintiff need not allege or

90. See *Cipollone v. Liggett Group Inc.*, 112 S. Ct. 2608, 2621 (1992).

91. *Id.*

92. *BAJI* No. 12.31 (1991); see also 5 WITKIN, SUMMARY OF CALIFORNIA LAW § 676 (9th ed. 1988); CAL. CIV. CODE § 1709 (West 1987); *Hobart v. Hobart Estate Co.*, 159 P.2d 958, 964 (Cal. 1945). The court in *Hobart* stated:

In general, to establish a cause of action for fraud or deceit plaintiff must prove that a material representation was made; that it was false; that defendants knew it to be untrue or did not have sufficient knowledge to warrant a belief that it was true; that it was made with an intent to induce plaintiff to act in reliance thereon; that plaintiff reasonably believed it to be true; that it was relied on by plaintiff; and that plaintiff suffered damage thereby.

*Id.* at 964.

93. *Bank of the West v. Superior Ct.*, 833 P.2d 545, 553 (Cal. 1992). The court in *Bank of the West* explained:

In drafting the [Unfair Competition Act], the Legislature deliberately traded the attributes of tort law for speed and administrative simplic-

show that she actually relied on the misrepresentation<sup>94</sup> or that she suffered damages as a result thereof.<sup>95</sup> In fact, a claim based on the Unfair Competition Act can be sustained even if no one actually suffered harm.<sup>96</sup> Lastly, unlike the fraudulent misrepresentation claim, the wrongdoer's intent may be irrelevant under an unfair competition claim.<sup>97</sup>

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ity. As a result, to state a claim under the [A]ct one need not plead and prove the elements of a tort. Instead, one need only show that "members of the public are likely to be deceived."

*Id.* (citing *Chern v. Bank of America*, 544 P.2d 1310, 1316 (Cal. 1976)).

94. See *supra* note 54 and accompanying text. More specifically, the court in *Children's* stated that, unlike a claim based on the tort of fraud, allegations of actual deception, reasonable reliance, and damage are unnecessary to state a cause of action under the Unfair Competition Act. *Committee on Children's Television, Inc. v. General Foods Corp.*, 673 P.2d 660, 668 (Cal. 1983).

95. See *supra* note 36; *Children's*, 673 P.2d at 671. The California Supreme Court allowed an organizational plaintiff to bring an unfair competition claim against a children's breakfast cereal manufacturer, despite the fact that the "organizational plaintiffs [admittedly] suffered no legal cognizable damages under any cause of action." *Id.*; see also *Hernandez v. Atlantic Finance Co.*, 164 Cal. Rptr. 279, 283-84 (Ct. App. 1980) (holding a private plaintiff may bring an unfair competition claim against an automobile dealer and a lending institution for violating the Rees-Levering Automobile Sales Finance Act despite the fact that the plaintiff did not purchase an automobile from one of the defendants and neither borrowed nor attempted to borrow money from the other defendant); but see *Stoiber v. Honeychuck*, 162 Cal. Rptr. 194, 207 (Ct. App. 1980). In *Stoiber*, the court held that a former tenant of rental premises did not have standing to bring an unfair competition claim against her former landlord for unlawfully failing to keep the rental premises in habitable condition because she was no longer "in possession of any of the properties owned or managed by the defendants" and had "no need of or standing to seek an injunction [under the Unfair Competition Act] on her own behalf." *Id.* at 207. The court went on to point out, however, that the "appellant ha[d] failed to allege that she is suing on behalf of the general public," thereby implying that such an allegation may have cured the plaintiff's defect in standing. *Id.* at 207.

96. In *Children's*, the court also concluded that an unfair competition claim can be sustained, and injunctive relief awarded, even if no one was actually injured because the plaintiff is only required to show that "members of the public are likely to be deceived." *Committee on Children's Television, Inc. v. General Foods Corp.*, 673 P.2d 660, 668 (Cal. 1983) (citing *Payne v. United California Bank*, 100 Cal. Rptr. 672 (Ct. App. 1972)); *Audio Fidelity, Inc. v. High Fidelity Recordings, Inc.*, 283 F.2d 551, 554-55 (9th Cir. 1960)). See also *supra* note 93; *Chern v. Bank of America*, 544 P.2d 1310, 1316 (Cal. 1976). In *Chern*, the court allowed an unfair competition claim against a bank for misquoting the interest rate charged on loans despite the fact that the plaintiff was fully aware of the actual interest rate charged when she entered into the loan agreement with the defendant. *Id.* at 1316. The court in *Chern* also recognized that the Unfair Competition Act "affords protection against the probability or likelihood as well as the actuality of deception." *Id.*

97. There is no reported case directly on point. However, the fact that the Unfair Competition Act does not specify a scienter requirement is probative. It has long been accepted that "[where] qualifying words such as knowingly, in-

These differences are not necessarily fatal. Although the *Cippolone* plurality made specific reference to the long standing rule governing fraud, the plurality did not indicate that only common law fraud claims were saved from preemption.<sup>98</sup> Rather, the reference to common law fraud claims seems merely exemplary. Indeed, the plurality based its holding on the particular attributes of the petitioner's common law fraud claim.<sup>99</sup> The plurality emphasized that the petitioner's fraudulent misrepresentation claim was saved from preemption because it was based on a "duty not to deceive" and on a "single uniform standard of falsity."<sup>100</sup> An unfair competition claim appears to possess these attributes as well. In fact, the statutory definition of "unfair competition" includes false and deceptive advertisements and statements.<sup>101</sup> Furthermore, because sections 17200 and 17500 expressly proscribe "untrue" advertising or statements,<sup>102</sup> it can be argued that unfair competition claims are also based on a "single uniform standard [of] falsity."

However, the traditional interpretation of the Unfair Competition Act as proscribing advertisements that are "likely to deceive" the public poses a problem in drawing an analogy.<sup>103</sup> The scope of "misleading" advertisements appears to be both broader and narrower than "false or decep-

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tentionally, or fraudulently, are omitted from provisions creating the offense it is held that guilty knowledge and intent are not elements of the offense . . . ." *People v. Regan*, 157 Cal. Rptr. 62, 64 (Ct. App. 1979). Further, California courts have traditionally imposed strict liability where a particular statute is designed to protect the public from "fraudulent conduct for which most members of the public are helpless to protect themselves." *Id.* at 64. Thus, given the lack of "qualifying words" in the Unfair Competition Act and given that the statute has long been recognized as a consumer protection provision, it is reasonable to assume that scienter is not a requisite element of an unfair competition claim. See, e.g., *Barquis v. Merchants Collection Assn.*, 496 P.2d 817, 828-30 (Cal. 1972) (indicating that the Unfair Competition Act demonstrates a clear design to protect consumers); *People ex rel. Mosk v. National Research Co.*, 20 Cal. Rptr. 516, 520 (Ct. App. 1962) (holding that section 17200 and its predecessor California Civil Code section 3369 are designed to protect the right of the public from fraud and deceit).

98. *Cipollone v. Liggett Group Inc.*, 112 S. Ct. 2608, 2625 (1992) (holding that the Labeling Act did "not preempt petitioner's express warranty and conspiracy claims as well as petitioner's fraudulent misrepresentation claim").

99. *Id.* at 2623-24.

100. *Id.*

101. See *supra* text accompanying notes 30-33.

102. See *supra* text accompanying note 37.

103. See *supra* notes 38-41 and accompanying text.

tive" misrepresentations. The scope of an unfair competition claim is narrower in that such a claim may not lie against advertisements that are clearly false and thus, are unlikely to mislead the public.<sup>104</sup> On the other hand, an unfair competition claim can be stated against factually true advertisements that are, nevertheless, likely to mislead the public.<sup>105</sup> This defect, however, seems curable if the plaintiff specifically alleges and shows that the conduct complained of under the Unfair Competition Act is also "false" or "deceptive."

One possibly incurable defect in the unfair competition claim is that it may create "diverse, nonuniform, and confusing" standards among the states in direct contravention of the Labeling Act's purpose.<sup>106</sup> This is attributable to the fact that not all states have enacted statutes similar to the Unfair Competition Act. Furthermore, even those that have enacted similar consumer protection statutes may not necessarily interpret the statutes in a comparable manner. Lastly, the ambiguous fashion in which California courts have defined the term "unfair competition"<sup>107</sup> may lead to the creation of nonuniform standards within California, in addition to the diversity among the states.

Notwithstanding the purpose of the Labeling Act, complete uniformity does not appear to be a requirement under the plurality's holding. The plurality allowed the petitioner's fraudulent misrepresentation claim even though the question of whether a statement or omission constitutes a misrepresentation "would almost certainly [be] answered differently from state to state."<sup>108</sup> Further, this defect may be cured if the plaintiff can show the defendant's misleading misrepresentations were untrue because then the claim, arguably, is based on a "single uniform standard of falsity."<sup>109</sup>

Whether the unfair competition claim is preempted by the Labeling Act is left unclear because of the plurality's failure to adequately explain what duties are "based on smoking and health."<sup>110</sup> Further, the failure of the California courts'

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104. See *supra* notes 38-42 and accompanying text.

105. See *supra* notes 38-41 and accompanying text.

106. See *supra* text accompanying notes 58-60.

107. *Id.*; see also *supra* notes 42-55.

108. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2636 (1992) (Scalia, J., dissenting).

109. *Id.* at 2624.

110. See *supra* text accompanying notes 69-84.

to clearly define the scope of an unfair competition claim<sup>111</sup> and the fact that an unfair competition claim is significantly different from a common law fraudulent misrepresentation claim<sup>112</sup> poses problems with respect to the preemption issue.

Nevertheless, the *Cipollone* plurality opinion serves as a helpful guide in bringing an unfair competition claim against the tobacco industry. Given that the plurality placed importance on the fact that the petitioner's common law fraudulent misrepresentation claims were based on allegations of "deception" and the standard of "falsity,"<sup>113</sup> it would appear prudent to tailor the unfair competition claim to specifically allege that the CTR's misrepresentations were both deceptive and false. Furthermore, given the holding in *Cipollone* that a fraudulent misrepresentation claim is preempted to the extent that it asserts that the efficacy or the sufficiency of the federally mandated warnings is negated,<sup>114</sup> it may be advisable to steer away from such allegations with respect to the unfair competition claim.

#### IV. PROS AND CONS OF THE UNFAIR COMPETITION CLAIM

Bringing an unfair competition claim has its advantages and drawbacks. The most important advantage is that fewer elements are required to establish an unfair competition claim than are required to establish a common law fraudulent misrepresentation claim.<sup>115</sup> Because a plaintiff need not allege that she actually relied on any particular misrepresentation made by the CTR,<sup>116</sup> all evidence of the CTR's scheme to mislead the general public about smoking and health is relevant for discovery and for presentation to the fact finder at trial.

In contrast, under a fraudulent misrepresentation claim, only those misrepresentations upon which a particular plaintiff relied are relevant for discovery and trial. Further, because, in a unfair competition claim, a plaintiff need not allege actual damages caused by reliance on a particular

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111. See *supra* notes 38-41 and accompanying text.

112. See *supra* notes 92-97 and accompanying text.

113. See *supra* text accompanying notes 74-78.

114. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2623 (1992).

115. See *supra* notes 42, 50-55, 94-97 and accompanying text.

116. See *supra* note 94 and accompanying text.



misrepresentation,<sup>117</sup> a plaintiff would not be subject to the onerous and possibly embarrassing discovery sought by the tobacco industry in an attempt to negate either the actual reliance or causation elements.<sup>118</sup> Also, given that the unfair competition claim can be sustained even if no one actually suffered damages,<sup>119</sup> a plaintiff bringing an unfair competition claim on behalf of the general public under section 17204 would not be constrained by the particular factual circumstances or goals of the representative plaintiff. Such a representative plaintiff would be required in order to bring a suit under the common law fraudulent misrepresentation theory. Lastly, unlike the common law fraud claim, reasonable reliance may not be a requisite element of an unfair competition claim.<sup>120</sup> If this is the case, a plaintiff bringing an unfair competition claim would have a tremendous advantage in not having to show it was reasonable to rely on the CTR's misrepresentations despite the CTR's financial affiliation with the tobacco industry<sup>121</sup> and despite the general public's actual and imputed awareness about the deleterious effects of smoking.<sup>122</sup>

In terms of disadvantages, however, the limited remedies available under the Unfair Competition Act are a considerable drawback. The only remedies permitted under the Unfair Competition Act are injunctive and restitutionary relief.<sup>123</sup> Compensatory damages are not allowed in an unfair competi-

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117. See *supra* note 95 and accompanying text.

118. Nightline with Ted Koppel, *supra* note 15. An interview with a former director of the CTR revealed that the tobacco industry used onerous and embarrassing discovery tactics under the guise of negating the actual causation and justifiable reliance elements to discourage plaintiffs from maintaining their suits against the tobacco industry. *Id.*

119. See *supra* note 96 and accompanying text.

120. See *supra* notes 42, 50-55 and accompanying text.

121. See *supra* text accompanying notes 5-6, 43.

122. See *supra* text accompanying notes 45-48.

123. See CAL. BUS. & PROF. CODE §§ 17203, 17535 (West Supp. 1995). Section 17203 provides, in pertinent part:

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined. . . . The court may make such orders or judgments . . . as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition . . . or as may be necessary to restore to any person in interest any money or property . . . which may have been acquired by means of such unfair competition.

CAL. BUS. & PROF. CODE § 17203 (West Supp. 1995). Section 17535 states, in relevant part:

tion claim.<sup>124</sup> Further, because punitive damages are incident to actual damages, they are not permitted under an unfair competition claim.<sup>125</sup> Lastly, although a private plaintiff suing on behalf of the public may be able to recover attorney's fees under California Code of Civil Procedure section 1021.5,<sup>126</sup> attorney's fees are not explicitly authorized by the Unfair Competition Act for violations of sections 17200 or 17500.<sup>127</sup>

Thus, the only significant monetary recovery allowed under the Unfair Competition Act would be based on restitution. Exactly how much money can be recovered under the

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Any person . . . [who] violates or proposes to violate this chapter may be enjoined. . . . The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person . . . which violate[s] this chapter, or which may be necessary to restore to any person in interest any money or property . . . which may have been acquired by means of any practice in this chapter declared to be unlawful.

CAL. BUS. & PROF. CODE § 17535 (West 1987).

124. See *Walnut Creek Manor v. Fair Employment & Housing Comm'n*, 814 P.2d 704, 706, 714 (Cal. 1991) (citing *Dean Witter Reynolds, Inc. v. Superior Ct.*, 259 Cal. Rptr. 789 (Ct. App. 1989)); see also *Bank of the West v. Superior Ct.*, 833 P.2d 545 (Cal. 1992) (explicitly overruling *United Farm Workers of America v. Superior Court*, 120 Cal. Rptr. 904 (Ct. App. 1975), the only California case that allowed compensatory damages under the Unfair Competition Act).

The court in *Dean Witter* explained that:

[t]he exclusion of claims for compensatory damages is also consistent with the overarching legislative concern to provide a *streamlined* procedure for the prevention of ongoing threatened acts of unfair competition. To permit individual claims for compensatory damages to be pursued as part of such a procedure would tend to thwart this objective by requiring the court to deal with a variety of damage issues of higher order of complexity.

*Dean Witter*, 259 Cal. Rptr. at 799.

125. See *Jackson v. Johnson*, 7 Cal. Rptr. 2d 482, 491 (Ct. App. 1992) (citing *Clark v. McClurg*, 9 P.2d 505 (Cal. 1932)); *Haydel v. Morton*, 48 P.2d 709 (Cal. Ct. App. 1935); *Brewer v. Second Baptist Church*, 197 P.2d 713, 720 (Cal. 1948).

126. CAL. CODE CIV. PROC. § 1021.5 (West Supp. 1995). For a general discussion on recovering attorneys' fees under CAL. CODE CIV. PROC. § 1021.5 in the context of unfair competition claims, see *Committee to Defend Reproductive Rights v. Free Pregnancy Center*, 280 Cal. Rptr. 329 (Ct. App. 1991), and *Midpeninsula Citizens for Fair Housing v. Westwood Investors*, 271 Cal. Rptr. 99, 102 n.3 (Ct. App. 1990).

127. See *California Service Station and Automotive Repair Assn. v. Union Oil Co. of California*, 283 Cal. Rptr. 279, 286 (Ct. App. 1991) (citing *Pachmayr Gun Works, Inc. v. Olin Mathieson Chem. Corp.*, 502 F.2d 802, 809-12 (9th Cir. 1974)). Section 17082 is the only section in the California Business and Professions Code that provides for attorneys' fees and applies only to claims of price discrimination, secret rebates and loss selling.

restitutionary remedy is unclear. Under the statute, the amount of money to be restored appears to be linked to the amount of benefit that the defendant derived from engaging in the proscribed conduct.<sup>128</sup> However, the California Supreme Court in *Fletcher v. Security Pacific National Bank*<sup>129</sup> has made clear that the restitutionary remedy is not necessarily dependent upon or limited by the amount of benefits that was conferred upon the defendants due to their unlawful conduct.<sup>130</sup> Instead, the Court interpreted the Unfair Competition Act as allowing courts to fix a restitutionary amount that is "necessary 'to prevent the use or employment' of unfair practices."<sup>131</sup>

It is unclear what amount of restitution is *necessary* to deter the CTR and the tobacco industry from continuing their misrepresentation scheme. Arguably, monetary restitution is not necessary because a court order enjoining future *use or employment of unfair practices* will serve as specific deterrence. On the other hand, general deterrence will not be achieved if wrongdoers are allowed to retain the benefits of their unlawful conduct.<sup>132</sup> Thus, the tobacco industry should be required to disgorge an amount of money that is at least equal to the benefits that it recognized through its misrepresentation campaign.

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128. See *supra* note 123. Section 17535 allows the court to order restitution in "money or property . . . which may have been acquired by means of any practice . . . declared to be unlawful [under the Unfair Competition Act]." CAL. BUS. & PROF. CODE § 17535 (West 1987).

129. 591 P.2d 51 (Cal. 1979).

130. *Id.* at 55-59.

131. *Id.* at 56. The court's holding dispensed with a need to show a direct link between the proscribed act and the amount of money to be restored. This holding was based on the court's interpretation of section 17535, as well as the equitable power of the courts, to "accomplish complete justice between the parties" through restitution even in the absence of a specific statutory provision. *Id.*

132. *Id.* at 56.

[Through Business and Professions Code section 17535,] the Legislature obviously intended to vest the trial court with broad authority to fashion a remedy that would effectively 'prevent the use . . . of any practice which violate [the] Chapter [proscribing unfair trade practices]' and deter the defendant, and similar entities, from engaging in such practices in the future. The requirement that a wrongdoing entity disgorge improperly obtained money surely serves as the prescribed strong deterrent.

*Id.* (emphasis added) (alterations in original).

The latter approach does not simplify the matter much because putting a dollar value on the benefits attained by the tobacco industry through its misrepresentation campaign is a daunting task. Not only is it difficult to accurately account for all cigarette sales that are attributable to their misrepresentation scheme,<sup>133</sup> but it is even more difficult to estimate the value of the good-will derived through the misrepresentation. However, it can be argued that the tobacco industry should bear the burden of establishing this element. Given that the tobacco industry would not have established and sustained the CTR for over 40 years<sup>134</sup> unless doing so was profitable, courts can presume that the value of benefits gained by the misrepresentation is at least equal to the costs of maintaining the CTR and other facets of the misrepresentation campaign. This presumption would allow for the possibility that the CTR was not a profitable venture by shifting the burden to the tobacco industry to establish such a defense. This appears to be an equitable solution as the tobacco industry is in a better position than the plaintiff to establish these facts.

## V. CONCLUSION

Whether an unfair competition claim can be successfully asserted against the tobacco industry remains unclear due to the loose manner in which California courts have interpreted the Unfair Competition Act.<sup>135</sup> Furthermore, the United States Supreme Court's failure to establish a clear and reliable preemption standard leaves unanswered the question of whether the unfair competition claim is preempted by the Labeling Act. Even without these uncertainties, the unfair competition claim is far from an ideal replacement for the more traditional claims brought against the tobacco industry because it does not allow for compensatory nor punitive damages and because the amount of restitutionary damages that can be recovered is uncertain.<sup>136</sup> However, given that the un-

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133. This would also erode some of the benefits of bringing an unfair competition claim because having to show a link between the CTR's misrepresentations and additional cigarette sales would be tantamount to requiring the plaintiff to establish actual causation.

134. See *supra* notes 5-6 and accompanying text.

135. See *supra* notes 38-41 and accompanying text.

136. See *supra* notes 123-34 and accompanying text.

fair competition claim is a cumulative remedy<sup>137</sup> that requires the plaintiff to show fewer elements than "traditional" claims, such as the common law fraudulent misrepresentation claim,<sup>138</sup> a plaintiff should raise the unfair competition claim in addition to other types of claims brought against the tobacco industry.

## VI. ADDENDUM

After this article was written, the California Supreme Court decided the case of *Mangini v. R.J. Reynolds Tobacco Company*.<sup>139</sup> The plaintiff in *Mangini* brought an unfair competition action against the manufacturer of Camel cigarettes to enjoin the defendant's use of a cartoon character for promoting its cigarettes to minors, in violation of California Penal Code section 308, which proscribes the sale of tobacco products to persons under the age of 18.<sup>140</sup>

The court of appeal in that case first addressed the issue of whether the defendant's conduct constituted "unfair, deceptive, untrue or misleading advertising," as proscribed by California's Unfair Competition Act.<sup>141</sup> The court of appeal recognized that the purported exploitation of an inappropriate audience of minors did not alone constitute deceptive, untrue or misleading advertising.<sup>142</sup> Further, it noted that there was no statutory definition of "unfair" advertising in California law.<sup>143</sup> Thus, the court applied the Federal Trade Commission's standard for determining whether particular conduct that is not deceptive is nevertheless "unfair" under

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137. See CAL. BUS. & PROF. CODE § 17205 (West 1987) ("Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies and penalties available under all other laws of the state.")

138. See *supra* notes 42, 50-55, 94-96 and accompanying text.

139. 875 P.2d 73 (Cal. 1994), *aff'g* 21 Cal. Rptr. 2d 232 (Ct. App. 1993), *cert. denied* 115 S. Ct. 577 (1994).

140. *Id.* at 78; see CAL. PENAL CODE § 308(a), (b) (West Supp. 1995).

141. *Mangini*, 21 Cal. Rptr. 2d at 240; see *supra* notes 25-55 and accompanying text.

142. *Mangini*, 21 Cal. Rptr. 2d at 240.

143. *Id.* The court noted that the general proscription against "unfair" business practices established only a broad, equitable standard to allow courts to enjoin ongoing wrongful business conduct in whatever context it may occur. *Id.* (citing *Barquis v. Merchants Collection Assn.*, 496 P.2d 817, 830-31 (Cal. 1972)).

the Federal Trade Commission Act.<sup>144</sup> Using the federal standard, the court of appeal concluded that targeting minors for cigarette sales was "unfair" and thus violated California's Unfair Competition Act.<sup>145</sup>

The court of appeal also addressed whether the federal Labeling Act preempted the plaintiff's unfair competition claim by analyzing the United States Supreme Court holding in *Cipollone v. Liggett Group, Inc.*<sup>146</sup> The court recognized that the touchstone of the preemption analysis was whether the plaintiff's claim was predicated upon a duty "based on smoking and health."<sup>147</sup> The court of appeal concluded that Congress' preservation of the Federal Trade Commission's authority to regulate "unfair or deceptive acts or practices in the advertisement of cigarettes"<sup>148</sup> indicates this standard should be construed narrowly so as not to proscribe the regulation of unfair cigarette advertising.<sup>149</sup> Thus, having found

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144. *Mangini v. R.J. Reynolds Tobacco Co.*, 21 Cal. Rptr. 2d 232, 241 (Ct. App. 1993). The Court of Appeal justified its adoption of the federal standard on the ground that the Federal Trade Commission Act contained language similar to California's Unfair Competition Act. See 15 U.S.C. § 45 (1988). The Act proscribes "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1) (1988). It also drew support from *People ex rel. Mosk v. National Research Co.*, 20 Cal. Rptr. 516 (Ct. App. 1962), which established that courts may be guided by interpretation of similar provisions of federal law to determine the scope of California's Unfair Competition Act. *Id.* at 521. This court held that the defendant's use of documents assimilating official government forms violated California's Unfair Competition Act. *Id.* at 519, 523. Its decision was based on the fact that the Federal Trade Commission and a federal circuit court found that identical conduct violates the provisions of the Federal Trade Commission Act. *Id.* at 518-19.

The Federal Trade Commission uses the following guideline for determining whether a non-deceptive conduct is nevertheless "unfair": (1) whether the conduct offends public policy; (2) whether the conduct is immoral, unethical, oppressive or unscrupulous; and (3) whether the conduct causes substantial injury to consumers. *Mangini*, 21 Cal. Rptr. 2d at 241 (citing *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45, n.5 (1972)).

145. *Mangini*, 21 Cal. Rptr. 2d at 241. The appeals court concluded that targeting minors for cigarette sales: (1) offends the public policy established by, *inter alia*, California Penal Code section 308 which proscribes the sale of tobacco products to persons under the age of 18; (2) oppressively and unscrupulously lures minors into an unhealthy and potentially life-threatening addiction before they are mature enough to make an informed decision about smoking; and (3) causes substantial injury to the minors. *Id.* at 241.

146. *Id.* at 243. See *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

147. *Mangini*, 21 Cal. Rptr. 2d at 243.

148. 15 U.S.C. § 1336(b) (1988).

149. See *Mangini v. R.J. Reynolds Tobacco Co.*, 21 Cal. Rptr. 2d 232, 243-44 (Ct. App. 1993). The appellate court's conclusion parallels the logic established

the defendant's conduct was unfair under California's Unfair Competition Act, the court of appeal concluded that the plaintiff's action to enjoin such conduct was not preempted by the federal Labeling Act.<sup>150</sup>

On review, the California Supreme Court did not address whether the defendant's conduct violated California's Unfair Competition Act.<sup>151</sup> It affirmed the appeal court's holding that the defendant's conduct was not preempted by the Labeling Act but for a different reason.<sup>152</sup> In its preemption analysis, the California Supreme Court focused on the fact that the defendant's targeting of minors for cigarette sales violated the provisions of California Penal Code section 308.<sup>153</sup> The court concluded that the plaintiff's claim was not preempted because it was predicated on a duty to "not engage in unfair competition by advertising illegal conduct or encouraging others to violate the law" rather than a duty based on "smoking and health."<sup>154</sup> The court defended its holding as consistent with the purpose of the Labeling Act<sup>155</sup> and cited evi-

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by the United States Supreme Court in *Cipollone*. *Cipollone*, 112 S. Ct. at 2608. In *Cipollone*, the Supreme Court held that the phrase "smoking and health" did not encompass regulations of *deceptive* advertising based on the fact that the Labeling Act expressly preserved the Federal Trade Commission's authority to regulate "unfair or deceptive acts or practices in the advertisement of cigarettes." *Mangini*, 21 Cal. Rptr. 2d at 243 (citing 15 U.S.C. § 1336 (1988)) (emphasis added). The appeals court concluded that regulation of *unfair* cigarette advertisements is likewise preserved. *Id.* at 243-44.

Arguably, this holding contravenes the purpose of the Labeling Act to "establish a comprehensive Federal program to deal with cigarette labeling and advertising . . . [so that] commerce and national economy may . . . not be impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations." 15 U.S.C. § 1331 (1988); see *supra* notes 58-61 and accompanying text. The fact that California's Unfair Competition Act does not define what constitutes "unfair" advertisements and, instead, establishes only a broad, equitable standard makes the appeal court's decision even more susceptible to this challenge. See *supra* notes 103-12, 143-44 and accompanying text.

150. *Mangini*, 21 Cal. Rptr. 2d at 244.

151. The California Supreme Court limited review "to the merits of the preemption issue" because the defendant did not challenge the lower court's holding that targeting minors states a valid cause of action under California's Unfair Competition Act. *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73, 76 (Cal. 1994).

152. *Id.* at 81.

153. *Id.* at 79-80; See CAL. PENAL CODE § 308a (West 1988) (proscribing sale of tobacco products to persons under the age of 18).

154. *Mangini*, 875 P.2d at 76.

155. *Id.* The court stated that its conclusion was consistent with the purpose of the Labeling Act because the prohibition against advertising to minors did

dence indicating Congress' intent not to preempt state regulation of cigarettes sales to minors.<sup>156</sup>

*Mangini v. R.J. Reynolds Tobacco Co.* is significant because it is the first case involving a successful unfair competition claim asserted against a tobacco company's promotional practices. However, its decision sheds little light on the meaning of the phrase "based on smoking and health" which governs the preemptive scope of the Labeling Act.<sup>157</sup> This is because the *Mangini* decision dealt with the sale of cigarettes

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not create "diverse, nonuniform, and confusing standards" and relied instead on a single, uniform standard. *Id.* (citation omitted).

156. *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73, 80-82 (Cal. 1994). The California Supreme Court cited a senate report which states that members of Congress enacting the Labeling Act did not intend to "affect the power of any state . . . with respect to . . . the sale of cigarettes to minors." *Id.* (citing the United States Supreme Court's holding in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2624 (1992), which in turn cited Senate Report number 91-566, at 12). The California Supreme Court also referred to more recent federal legislation, which encourages states to enact and enforce laws prohibiting the sale of cigarettes to minors, for the proposition that the Labeling Act was not intended to preempt state regulation of cigarette sales to minors. *Id.* at 82.

The California Supreme Court may be correct in concluding that Congress did not intend to preempt state regulation of cigarettes sales to minors. However, its more general proposition that claims predicated on a duty to refrain from "unfairly assist[ing] or advertis[ing] illegal conduct" are saved from preemption seems overbroad. See *supra* notes 153-56 and accompanying text. The mere fact that the tobacco industry promoted conduct violating statutory or common law does not appear to govern the preemption issue. Rather, the germane issue appears to be whether the duty imposed by such statutory or common law is disallowed because of federal preemption provisions.

This is illustrated by the United State Supreme Court's holding in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992). In concluding that the petitioner's fraudulent misrepresentation claim is preempted to the extent that it asserts that the respondents neutralized the efficacy or sufficiency of federally mandated warning labels through their promotional activities, the Supreme Court focused exclusively on whether the duty sought to be imposed by the common law fraudulent misrepresentation theory was consistent with the provisions contained in the federal Labeling Act. *Cipollone*, 112 S. Ct. at 2622-23. More specifically, the Supreme Court noted that the petitioner's claim was predicated on a duty imposed by state law to refrain from making statements in advertisement or promotional materials that minimize the health hazards associated with smoking. *Id.* The Court held that such state law requirements were preempted by the Labeling Act. *Id.*

Thus, the California Supreme Court's blanket conclusion that claims predicated on a duty to refrain from unfairly assist[ing] or advertis[ing] illegal conduct are saved from preemption without first analyzing whether the duty imposed by such statutory or common law survives the federal preemption provisions appears to contradict the United States Supreme Court's holding in *Cipollone*.

157. *Cipollone*, 112 S. Ct. at 2621.



to minors<sup>158</sup> and Congress had already indicated its intent not to preempt state regulation in this area.<sup>159</sup> It remains to be seen whether unfair competition claims can be successfully asserted against the tobacco industry in contexts which Congress did not specifically save from preemption.

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158. *Mangini*, 875 P.2d at 78.

159. See *supra* note 156 and accompanying text.